Date: July 26, 1996
Case No.: 94-INA-00611

In the Matter of:

IDEA COURIER,
Employer

On Behalf of:

SUTANU GHOSH,
Alien

Appearance: Marshall G. Whitehead, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 24, 1992, Idea Courier ("Employer") filed an application for labor certification to enable Sutanu Ghosh ("Alien") to fill the position of Software Engineer (AF 71). The job duties for the position are:

> Preparation of design documents and test plans. Perform functionality code and test. Assist with subsystem and system level test. Enhance technical awareness of the product and development tools. Resolve product defects reported from the field and software qualification groups. Communicate project issues and status to engineering management.

The requirements for the position are a Masters of Science Degree in MIT or Mechanical Engineering, with the major field of study being Computer Graphics, CAD/CAM or equivalent. The position also requires six months of experience in the job offered or in the related occupation of software analysis evaluation, design, and development. Other Special Requirements are working knowledge of: (1) Design of user interface for software; (2) 'C' programming; (3) Interactive computer graphics; (4) UNIX and DOS operating systems; (5) Computer networking and communications; and, (6) Auto CAD and Fast CAD.

The CO issued a Notice of Findings on October 22, 1993 (AF 63), proposing to deny certification on the grounds that the Employer's advanced Degree and Other Special Requirements are restrictive and the Employer did not provide the actual minimum requirements because the Alien did not possess those requirements at the time he was hired in violation of 20 C.F.R. § 656.21(b)(5). The CO also found that U.S. applicants Strong, Sanchez, Hall, and Page were rejected for other than lawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6).

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In addition, the CO found that 37 other applicants possessed the training, education, and experience to perform the usual requirements of the occupation, and were rejected in violation of 20 C.F.R. § 656.24(b)(2)(iii).

Accordingly, the Employer was notified that it had until November 26, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated November 22, 1993 (AF 63), the Employer contended that the advanced degree requirement was "inadvertently" placed on the application, but was not placed in the newspaper ad or the job posting. The Employer stated that lacking the advanced degree was never the sole reason for rejecting any applicant, and was only mentioned to show that the applicant's lack of experience was not mitigated by advanced education. The Employer also stated that all of its special requirements were justified, and submitted documentation from the Alien and his university project advisor which stated that the Alien had the required experience at the time he was hired. The Employer also provided reasons for the rejection of each applicant. The Employer contended that applicants Wieczkiewicz and Strong were contacted within the time prescribed for a written response, but chose not to be interviewed and to remain in their respec-tive consulting contracts, and that the Employer's recruitment effort was conducted in good faith.

The CO issued the Final Determination on March 21, 1994 (AF 41), denying certification because the Masters Degree and Special Requirements are unduly restrictive, the Employer's description of the special requirements indicate the job is not clearly open to any U.S. worker, U.S. applicants Hall and Sanchez were unlawfully rejected, U.S. applicants Abu-Obied, Kersetter, Riedler, Schroeder, Stickel, Teper, Tooley, Fayazi-Azad, Ghovanloo, Hovey, Levin, Osburn, and Prescott have backgrounds enabling them to perform job duties usual to the occupation, and that U.S. applicant Hall was not recruited in good faith.

On March 30, 1994, the Employer requested review of the denial of labor certification (AF 7). In that request, the Employer also stated that the CO had raised two issues that were not included in the NOF, and had confused this application with another application from the Employer for a similar position, which was approved by the CO. The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job

opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.20(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1

At issue in this case is whether the Employer's requirements are unduly restrictive, whether the Employer unlawfully rejected U.S. applicants, and whether some of those applicants were recruited in good faith.

Rejection of U.S. Applicants/Good-Faith Recruitment:

The CO denied certification in part because of the rejection of U.S. applicants Abu-Obied, Kersetter, Riedler, Schroeder, Stickel, Teper, Tooley, Fayazi-Azad, Ghovanloo, Hovey, Levin, Osburn, and Prescott, whom he found to be qualified for the position based upon their resumes. The Employer rejected all of those U.S. applicants without an interview, or attempting to interview them, except applicants Teper and Tooley.

Where an applicant's resume shows a broad range of experience, education, and training that raises the reasonable possibility that the applicant is qualified, although the resume does not express that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). The fact that a resume does not list all the requirements for the

position does not excuse the employer's failure to investigate the applicants, if the resumes raise the reasonable possibility that the applicants are qualified. *G.E. Aircraft Engines*, 89-INA-12, 14, & 16 (Apr. 20, 1990). An employer who fails to investigate the credentials of a U.S. applicant whose work experience appears to be the type or quality required for the job faces denial of certification. *Mindcraft Software Inc.*, 90-INA-328 (Oct. 2, 1991); *Tessa Lyn Solomon*, 93-INA-332 (July 28, 1994).

Considering only the current applicants, Abu-Obied, Kersetter, Riedler, Schroeder, and Stickel, who were not interviewed, we find, upon careful review of their resumes, that they have sufficient experience, training, and education to have warranted further investigation by the Employer. See *Gorchev & Gorchev Graphic Design*, *supra*. Labor certification is properly denied on this issue alone.

In addition, a U.S. worker is considered able and qualified for the job opportunity if, by education, training, and experience, or a combination thereof, he is able to perform the job duties in a normally accepted manner. Section 656.24(b)(2)(ii). This section applies where an applicant is competent to perform the job duties with a nominal period of on-the-job training, even though he or she does not possess all of the stated qualifications. *Mindcraft Software, Inc.*, 90-INA-328 (Oct. 2, 1991); *Union Express*, 87-INA-694 (June 28, 1988).

In rebuttal, the Employer's rejections of U.S. applicants Michael Schroeder and Steven Riedler were identical, stating:

> No computer network communications experience and has no working knowledge of the protocols of our environment or our industry. He could not function effectively to prepare design documents and test plans, perform functionality code and test, assist with subsystem level test, enhance technical awareness of the product and development tools, or resolve product defects reported from the field and software qualification groups.

The Employer's rejection of U.S. applicant Eric Stickel stated:

> Inadequate experience with actual software design. No computer network communications experience and has no working knowledge of the protocols of our environment or our industry. He could not function effectively to prepare design documents and test plans, perform functionality code and test, assist with subsystem level test, enhance technical awareness of the product and development tools, or resolve product defects reported from the field and software qualification groups.

In his resume, applicant Schroeder lists a Bachelor of Science Degree in Mechanical Engineering with 22 credits in computer science including computer graphics and CAD/CAM, over six months of experience in developing CAD/CAM software with integrating, testing, and evaluating the overall functionality of the system, development of an interactive graphical interface, direct experience in interactive graphics which included networking numerical data, UNIX, DOS, 'C' experience, and exposure to Medusa CAD (AF 147-48).

In his resume, Applicant Riedler lists a Bachelor of Science Degree in Engineering with a Major in Electronics Engineering Technology, six years of diverse experience in computer operations, programming, analysis, and testing, extensive background in digital and microprocessor system design, embedded software, solid state devices, and electronic communications, and software experience in UNIX and 'C' languages (AF 142-43).

In his resume, Applicant Stickel lists a Bachelor of Science Degree in Computer and Information Sciences Engineering, over one year's experience as a Software Engineer, with the duties of "[d]esign, develop, test and document printer microcode and device drivers," and software experience in UNIX, DOS, and 'C' languages (AF 149-50).

Applicant Schroeder's resume lists "networking," and applicant Riedler's resume lists "electronic communications," but they were rejected in part for having "no experience in computer networking and communications." Moreover, the application calls for a "working knowledge" of computer networking and communications, not "experience." Applicants Schroeder, Riedler, and Stickel were also rejected in part because they had "no knowledge of the protocols of our environment or our industry." However no such requirement is listed on the application. These applicants were also rejected because they "could not function effectively to perform . . ." five of the six listed job duties. However, no objective detailed basis is provided on why the applicants could not effectively perform these duties.

We find that the Employer's response in rebuttal does not provide an objective detailed basis for rejecting these applicants on the grounds that they cannot perform the required job duties. See *Associated Students, Inc.*, *supra*; *Quality Inn*, *supra.*

As we have found that labor certification has been properly denied, analysis of the Employer's unduly restrictive requirements, unlawful rejection of the other applicants, and the timely contact of other applicants are moot.

Arguments Raised in the Request for Review:

The Employer has argued in the Request for Review that the CO raised for the first time in the Final Determination the issue of the position not clearly being open to a U.S. worker

pursuant to § 656.21(c)(8) (AF 38). However, this section was cited by the CO in the NOF (AF 87). Moreover, our decision here is not based on consideration of this section.[2]

The Employer also stated that the CO had confused the recruitment for this Alien in March 1993 with an October 1992 recruitment of the Employer for a different alien, Jingru Wang, in a similar position, which had been approved by the CO (AF 38-39). A careful review of the NOF shows that the CO was aware of the prior recruitment, and separated its discussion into review of "current" and "prior" applicants. There is currently no precedent that deals with the issue of the consideration of applicants from prior recruitments for the same position with the same employer when the current recruitment is within a few months. However, we note that our decision here is not based on the analysis of any prior applicants, and the CO's approval of prior applications has no effect on the Board.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered this the ___ day of July, 1996, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary

[2] We note that of the six applicants chosen to be interviewed by the Employer, one could not be contacted, one was hired by the Employer in another capacity, two were contract employees working for the Employer who remained in that status, and two were rejected. In short, three of the five employees chosen to be interviewed are working for the Employer and the other two were rejected.

to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.